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GOVERNMENT AND JURISPRUDENCE OF THE MEXICANS BEFORE THE SPANISH CONQUEST.

IN ALL of the new world there have been found only two great human families: our Red Indian, in the lowest stage of civilization, and the highly civilized, cultured and comparatively educated Brown Indian of the tropics. From the latter are descended the greater part of the present inhabitants of Latin America, chief among whom in the present day are the Incas and the Aztecs.

In the present state of uncertainty in our relations with Mexico, the future of the majority of its population, descendants from the Aztecs or from the inhabitants of their tributary states, presents a problem, the solution of which would enable us to pursue a course of action that would eventually result in a benefit to America.

To judge the future of these races we must examine their past, and there is no method so adequate for this examination as an analysis of their ancient laws. In examining the laws of the Aztecs we must look to their past history, and not to the present morally and mentally inferior condition in which three centuries of bitter oppression by the Spanish have left them. The great representatives of the people—the greatest men of Mexico, men who have thrown off the Spanish yoke and have developed Mexico and suppressed rebellions, Juarez, Diaz, Huerto—have all been Aztecs, and the hope of Mexico for the future lies in the inherent capacity of the Aztecs as rulers.

Upon the arrival of the Aztecs in the Valley of Mexico they conceived the idea that they were the chosen people, and named themselves "Mexicans"¹ in order to distinguish themselves from the other divisions of the generic Nahuatl tribe. The Mexicans were essentially a warlike people, but exceedingly wise in their

¹ The leader of the Aztecs was called *Mexi*, from whom they were first named *Mexicatl*, and from which the words Mexico and Mexican are derived. 3 Herrera 190.

foreign policy, as a consequence of which they were not only able to hold their acquired territory, but in time could count upon the voluntary support of the greater part of the nations they had conquered.

Prescott says: "Machiavelli² noticed it as one great cause of the military success of the Romans 'that they associated themselves, in their wars with other states, as a principal,' and expressed his astonishment that a similar policy should not have been adopted by ambitious republics in later times. This * * * was the very course pursued by the Mexicans."

By reason of this liberal foreign policy, the boundaries of Mexico continued to expand until at the time of the arrival of the Spanish in 1519, the Mexican possessions extended from about one hundred miles north of the Valley of Mexico, from coast to coast, south to the furthestmost points of Nicaragua, with a population of perhaps ten million people.³

The few records now remaining of this great people are very meagre, and as Brantz Mayer says,⁴

"One of the most disgraceful destructions of property recorded in history is that which was accomplished in Mexico by the first Archbishop of New Spain, Juan de Zumarraga. He collected from all quarters * * * all the Indian manuscripts he could discover and causing them to be piled in a great heap in the marketplace of Tlateloco, he burned all these precious records, which * * * *might* have relieved the early history of the Aztecs from the obscurity with which it is now clouded.

"Yet facts enough have survived, not only the wreck of the conquest, but also the comparative stagnation of the viceroyalty, to satisfy us that there was a large class of people, at least in the capitals and their vicinity, whose tastes, habits, and social principles were nearly equal to the civilization of the old world at that time."⁵

Rodrigo de Allonoz "finds them to be a race of buyers and sellers * * * and he adds that they are as much devoted to

² Prescott, *Conquest of Mexico*, Vol. 1, p. 21 (note).

³ Bancroft, *The Native Races of the Pacific States*, Vol. 2, p. 455.

⁴ Mexico: Aztec, Spanish, Republican; Brantz Mayer, Vol. 1, p. 92.

⁵ *Id.*, p. 99.

all kinds of work as the laborers of Spain, only that they are more subtle and lively.”⁶ This is still true of the modern Aztec. From Cortez’s letters to the King and Queen of Spain⁷ we gather that there must have been a stupendous commercial life in Mexico at the time of the conquest. He said⁸ that in the capital “there is a square twice as large as the city of Salamanca * * * where are daily assembled more than sixty thousand souls engaged in buying and selling.”

GOVERNMENT.

Until A. D. 1363, the political government of the Aztec nation was aristocratic. But observing the military success obtained by surrounding nations under monarchical control, the Mexicans resolved upon the plan of an elective monarchy, whereby succession to the crown was limited to collateral relatives of the deceased monarch instead of to his direct heirs. The choice from among collateral relatives extended only to the nephews or brothers of the deceased emperor, in this manner eliminating the danger of imbecility or weakness frequent in direct descent. Upon the death of an emperor four electors, as representatives of the vote of the entire nation,⁹ were selected by the nobles. These men were the most learned and incorruptible that could be found, and since their authority extended no further than the one election there was little danger of abuse of power. Clavigero says in this regard¹⁰ that “the constitution of their state with respect to the succession to the crown could not have been better framed, as by means of it they not only avoided the inconveniences of hereditary succession, but those of election also.”¹¹

Ambassadors, governmental ministers on official duties, heralds in proper heraldic dress, messengers and couriers were held inviolable so long as they continued upon the road leading

⁶ Helps, *Conquest of Mexico*, Vol. 3, p. 122.

⁷ The Dispatches of Hernando Cortez, (Tr. by Geo. Folsom), p. 112.

⁸ *Id.*

⁹ See Carbajal, *Discurso Sobre la Legislacion de los Antiguos Mexicanos*, p. 12.

¹⁰ F. S. Clavigero, *The History of Mexico*, Vol. 2, p. 402, (Tr. by Cullen, Ed. 1787).

¹¹ See 3 Herrera 224.

to or from their destination. War was rarely declared without just cause, and never without great deliberation. It was deemed cowardly to attack the enemy without warning. If the foe was vanquished, a certain tribute of goods, money and military service was levied to supplement the internal revenue in Mexico proper.

Other sources of revenue were taxes levied on the property held in communities, or on property or goods brought into the city for sale,¹² manufacturing associations, fines upon culprits, income from lands and mines belonging to the state. The great lords of the Mexican empire were not actually taxed, although they regularly presented the emperor with flowers or fruit, or rich presents, in token of submission. They were also required to have the capital policed, and the royal castles repaired and maintained in good condition at all times. A peculiar element in their feudal system was the requirement that the vassals of the nobles pay a certain tribute directly to the emperor. Herrera points out that "There was very good order and management in the revenue, there being treasurers and controllers in all parts of the kingdom who received all the duties, which were sent every month to court, and they consisted of all that the sea and the land afforded."¹³

LEGISLATIVE.

The laws were first made by the priests, but as the nobles became more powerful they took this privilege to themselves. The imperial government continued to grow in power until in 1363, when Mexico became monarchical, the legislative powers became absolutely vested in the emperor, subject, however, to the advice of three supreme counselors who acted in a capacity somewhat similar to that of the members of the cabinet of the United States, but with much greater powers. They represented, respectively, all the different degrees of noblemen, and were elected by their particular order. If the emperor disregarded the advice of any one of these counselors, he offended the noble order which that counselor represented.¹⁴ These statesmen con-

¹² Cortez, p. 111, *et seq.*

¹³ 3 Herrera 225.

¹⁴ 3 Herrera 224.

trolled in a great measure questions pertaining to the government of the provinces, and also advised upon matters dealing with taxation. Besides this quasi-parliamentary order, there was a treasurer of the nation, a national historian, a national game warden, jewelers and artists, all of whom derived their offices from the crown.

New legislation and court decisions were periodically published by criers. Old laws were kept on record by means of paintings and hieroglyphic writings, in a building corresponding to our clerk's office.¹⁵

It is questionable whether the Aztecs controlled the country districts and cities outside of Mexico in the same manner as the capital. Because of their policy of local self-government, the outlying districts were probably controlled by the inhabitants according to their local laws, and were not interfered with so long as they maintained order and rendered tribute to the emperor of Mexico.

EXECUTIVE.

The emperor of the Aztecs was the chief executive. There is apparently no case on record where the laws passed by this supreme ruler were not rigorously enforced by him, nor was this strictness lessened even as against the immediate family of the monarch.¹⁶ The police power of the state was enforceable directly by the emperor, but was generally administered by the courts and nobles, who, in all cases, were responsible to the emperor. From the time of Montezuma II, new laws regulating vagrancy, idleness, begging and wantonness were severely enforced. Nobles were required to furnish men for cleaning and sprinkling the streets, whitewashing and polishing buildings for sanitary or ornamental purposes, lighting the streets in the cities at night, and for the purpose of maintaining order at all times.¹⁷ It was required that the hour of the night should be announced regularly from the astronomical observatories in the temples. If a person failed to bathe regularly the police forced the offender to use the public bath.¹⁸

¹⁵ 1 Mayer 105; Carbajal 5.

¹⁷ 2 Bancroft 437.

¹⁶ 2 Bancroft 443.

¹⁸ 2 Clavigero 410.

The regular police were called *topilli*. They were purely ministerial functionaries deriving power by appointment, whose duties were comparable to the duties of our city police. In the many markets in the cities there were special officers called inspectors or commissaries, whose duty it was to keep order, make arrests for crimes committed in their presence, or upon complaint by another who had been present at the commission. They seem also to have been meat inspectors, and arbitrators in cases of disputes not involving a breach of the peace. In addition to these duties they were also supposed to prevent fraud in the sale of goods.

The street police were without civil functions and could only arrest in case of disturbance, or for some other specific crime committed in their presence; or they could arrest by complaint of a citizen, and upon order from the magistrate's court.¹⁹ All families had their actions supervised by men holding the office of *judex*, or sheriff, and resembling our detectives in some ways. It was the duty of each *judex* to watch over the actions of the members of the families assigned to his supervision, and to report any disturbance or crime committed among them. These quasi-detectives had no power of arrest, but only power of complaint, and could only cause to be issued by a court of proper jurisdiction upon the suspected culprit an order, which was served by a summoner or runner, commanding the culprit to appear before the magistrate.²⁰ These officials frequently acted as arbitrators in disputes, but if there was no amicable settlement possible the parties went before the court for a decision. In case of a disturbance the police could be called at once to make the proper arrests.

At the appearance of the accused in court there was an almost immediate trial. If found guilty the culprit was placed in jail to await an appeal, if he desired one, else the sentence was executed at once. If the accused were condemned to death, it seems that the court officers themselves executed the sentence, by hanging, quartering, burning or by beheading the condemned.²¹ In

¹⁹ 1 Prescott 29, *et seq.*

²⁰ 1 Prescott 29, *et seq.*

²¹ 2 Bancroft 436.

the case of a lesser offense the judge could probably appoint a ministerial officer for the execution of the sentence.²²

JUDICIAL.

In²³ every quarter of the cities there was one magistrate or lower judge, called *teuctli*,²⁴ elected by the people of the district.²⁵ He held office for one year and was vested with civil and criminal powers, subject to appeal as a matter of right to the higher courts.²⁶ Most of the minor cases were settled in the magistrates' courts, and Bancroft says²⁷ that the proceedings in these courts "were conducted verbally, the parties producing the witnesses who testified under oath for the complaint or the defense * * * In cases of great importance, especially in civil suits where the possession of real estate was involved, paintings in which the property in dispute was represented were produced as authentic documents, and the whole of the proceedings, such as the object of the claim, the evidence, the names of the parties and their respective witnesses, as well as the decision or sentence, were recorded in court by notaries or clerks appointed for that purpose."

These recordations were used as authority upon questions of fact in the event of an appeal to a higher court. The higher courts could not try the case unless it were regularly appealed from the lower court.²⁸

For convenience a summary court was appointed in each of the great markets of the city. These petty justices held jurisdiction over all offenders in the plazas, and were vested with power of life and death in certain cases, such as larceny or affray, taking place in their public square. The evidence, trial and execution took place in a very brief space of time, probably a half hour in all, when the offender was caught in the act. This court settled disputed points which the inspector was unable to settle, and punished the party guilty of any of the offenses which were

²² *Id.*, 3 Brasseur de Bourbourg, *Histoire des Nations Civilisées du Mexique*, p. 580.

²³ See Enc. Britt., "Mexico."

²⁵ Carbajal 94.

²⁷ 2 Bancroft 443.

²⁴ 3 Brasseur de Bourbourg 581.

²⁶ 2 Bancroft 432.

²⁸ 2 Bancroft 437.

reported to them by the inspector. It is probable that this court was directly under the magistrate's court, and subject to his review on a disputed point.

An appeal lay from a magistrate's court to a higher or appellate court, which was composed of three judges appointed for life by the supreme judge of the nation. The appeal to this court embraced both civil and criminal matters. In civil matters its jurisdiction was final, but a criminal had one more appeal.²⁹ Court was held daily from sunrise to sunset in a building corresponding to our court house. Meals were brought to the judges at noon to prevent mental distraction by family affairs, and in order for them to be able to give their full attention to the case at bar. The decisions of these judges were controlled by precedents and new laws,³⁰ but the courts had no legislative authority whatever.

The dignity of these offices was very great. The judges were highly respected and honored, and they made a life study of law from moral, ethical and practical points of view. Lands with an appropriate amount of labor and equipment to be used in cultivation and properly to dispose of the produce ran with the office, and supported the judges for their lifetime. These farms were inalienable, and since the actual title was vested in the state, the judges as a matter of fact only acquired the beneficial use of the lands for life, although they held them independently of the crown. By providing for the support of the judges the Aztecs offset any tendency toward unjust decisions that the judges might have had because of necessity or avarice.

Prescott says³¹ that "the law authorizing an appeal to the highest judicature in criminal matters only shows an attention to personal security rendered the more obligatory by the extreme severity of their penal code, which would naturally make them more cautious of a wrong conviction." Composing these highest courts, there was a supreme judge, called *cihuacoatl*, over each of the principal cities, who was appointed by the emperor for life.³² They heard appeals from the tribunals of the three judges in criminal matters only, and from the *cihuacoatls* there was no

²⁹ 1 Prescott 29 *et seq.*

³⁰ Carbajal 93.

³¹ 1 Prescott 31.

³² 1 Prescott 29.

appeal even to the emperor, nor could the *cihuacoatls* review a decision unless on appeal. In addition to their judicial functions, they appointed their inferior judges and verified the accounts of the tax collectors.³³

"Besides these various tribunals for the general administration of justice," says Bancroft, "there were others that had jurisdiction in cases of a peculiar nature only. There was a court of divorce, and another which dealt only with military matters. * * * The especial jurisdiction of another tribunal extended over matters pertaining to arts and sciences, while the fourth court had charge of the royal exchequer, of taxes and tributes, and of those employed in collecting them."³⁴ No grave issue was ever decided until after a consultation between the judges and the emperor, which took place every twenty days. If the issue was of particular gravity, it was delayed for final disposition until a more important meeting was convened by the emperor, which took place every eighty days.

As to whether there were lawyers or not among the Aztecs, there is a direct and irreconcilable conflict among the authorities.³⁵

³³ There is some conflict on this point. "According to Clavigero, he did (hear appeals on criminal matters only). Prescott, Brasseur, de Bourbourg and Carbajal Espinosa agree with Clavigero, and Leon Carbajal cites Torquemada as an authority for this statement, but the fact is Torquemada distinctly affirms the contrary, as does Las Casas, from whom Torquemada takes his information. It appears, however, reasonable to suppose that in some exceptional cases, as for instance where the title to large possessions was involved, or where the litigants were powerful nobles, the Supreme Judge may have taken cognizance of civil affairs." 2 Bancroft 435. But Brasseur de Bourbourg, in speaking of the Tribunal of the Three Judges, said that "if the cause was civil it was without appeal; if it was criminal one could appeal to the *Cihuacoatl*." 3 Brasseur de Bourbourg, 580.

³⁴ Bancroft 442.

³⁵ Veytia (Hist Ant. Mej. Tom. III) pp. 207 to 208, says: "There were also lawyers and prosecutors, and the first were called *Tepantlatoni*, which means 'he who speaks for another,' and the second *Tlanemiliani*, who in substance exercised their functions almost in the same manner as in our own tribunals * * *. They gave opportunities to the litigants so that their counsel could speak for them, and this they did in the same manner as in our tribunals. See 2 Bancroft 444. But Brasseur de Bourbourg says: "The functions of a lawyer were unknown, the litigants themselves established their own cause, and they had their witnesses accompany them." 3 Brasseur de Bourbourg 581.

But it is certain that the Aztecs were wonderful orators and shrewd cross examiners, whether such qualities were exercised from the bench or the bar.

CRIMINAL LAW.

From the earliest beginning of the Aztec government, crimes against the state were clearly distinguished from crimes against persons and property, and there seems to have been none of the early Roman spirit of vengeance and retaliation, except in cases of wrongs to property. Under the Aztec laws, a criminal offended against the state, and not against an individual, although the individual was not thereby deprived of his civil remedy in tort. Thus traitors who betrayed the government were quartered, and their families, if they knew he contemplated such a course and did not inform against him, were sold into slavery. Any person wearing the insignia of the king or *cihuacoatl* was sentenced to death, and all of his property confiscated.³⁶ An injury to an ambassador or courier while on the road leading to or from his destination on official business was a capital offense. An unauthorized alteration of a sentence that had been adjudged by any court was punishable by death. It seems, therefore, that the Mexican and early Roman laws were the same in that "murderers, rioters, libelers, false witnesses, corrupt *judices*, patrons who defrauded their clients, those who stealthily destroyed their neighbor's crops were alike condemned to capital punishment."³⁷ Practically every crime that in our jurisprudence constitutes a felony was made capital under the severe Aztec penal code.

Homicide was generally punishable by death. The killing of a slave without just cause was murder. Nor could a husband kill the paramour of his wife, though caught *in flagrante delicto*, without incurring a capital sentence, since the life of the paramour, because of his adultery, was forfeited to the state, and the husband by his killing encroached upon its sovereignty. Larceny was divided into petit and grand; petit larceny was not punished, but the thief was forced to return the stolen article. Since there was less method of property protection in outlying districts, the

³⁶ Biart 229 *et seq.*; see Carbajal 81.

³⁷ Morey, Outline of Roman Law, p. 42.

penalty was very severe—according to Cortez, it was death for plucking even a few ears of corn. An exception to this rule was made, however, in the case of needy and hungry travelers, who could pluck a reasonable amount to eat on their journey. Generally the distinction above noted between petit and grand larceny was strictly maintained. The latter was usually punishable by the enslaving of the culprit. The victim of the theft, who was habitually the prosecuting witness, upon conviction of the accused, had the choice of enslaving him or of appropriating the proceeds of his sale. The Romans punished a thief in like manner, but added a scourging to the sale.³⁸

Marriage between parties related in the first degree of consanguinity or affinity was punishable by death.³⁹ Adultery was a capital crime in Mexico, but a somewhat milder offense in the provinces. One act of adultery by the husband was not considered sufficient to constitute the crime of adultery under their code; nor, probably, could he commit an act of adultery with an unmarried woman. It was not possible to condone the wife's guilt, since by doing so the husband forfeited his life to the state. But Las Casas writes: "No woman nor man was punished for adultery if only the husband (or wife) did the accusing, but they had to find witnesses and (get a) confession from them."⁴⁰

Sodomy, bestiality and like crimes were considered heinous and were punished by hanging, which was the most ignoble form of death.⁴¹ Seduction by a priest was punished by degradation and disgrace, but it is questionable whether such a crime was punishable if committed by a layman. There was no law against simple fornication except in the case of a noble woman or a nun, or a student in the colleges or seminaries, in which case the punishment was very severe, probably death. He who attempted to ravish a maiden, whether in the field or in her father's house, suffered death.⁴² Spendthrifts were not very long a burden to their nation since, when their inheritance had been wasted, they were hanged. The same fate was in store for guardians who

³⁸ Morey 41.

⁴⁰ 2 Bancroft 465.

⁴² 2 Bancroft 466.

³⁹ Carbajal 16.

⁴¹ See Carbajal 27.

lost or wasted the property of their wards, or for those who rendered false accounts.

During the time of Montezuma I, drastic prohibition laws⁴³ were enacted, by which a noble man or woman under forty, if seen drunk, was sentenced to death. If the inebriate were a plebeian, then for the first offense he was sentenced to jail; for the second offense he was killed, if a man, by the rod; if a woman, by stones. There were exceptions to this rule, however,—cases where by special permit drinking was permitted, provided there was no disturbance, as for instance, wedding feasts and great holidays. When the age of forty was reached neither the man nor the woman found drunk, whether plebeian or patrician, was sentenced to death. But all of the offender's property and title of nobility, if he had one, was confiscated, or if he had no title, he was degraded by having his hair cut off. When a person passed the age of sixty there was no restriction on his drinking.⁴⁴

Affray was punishable by confinement in jail for a few days, unless the disturbance took place in the market place, when the participants were punished with the *bastinado*, or even suffered death at times, if the offense were aggravated. Freedom of speech existed in the Aztec empire and even criticisms of the government, if not liable to create a disturbance, were permissible.⁴⁵ Yet historians who wrote false history were condemned to death;⁴⁶ and liars who by their lie caused an injury to another party had their lips or ears cut off.⁴⁷ Perjury consisted in making a false statement under oath, and was universally punished by death.

The pleadings were simple. "In the trials of the Mexicans," says Clavigero, "they admitted no other proof against the accused than that of witnesses. They never made use of the tor-

⁴³ Carbajal 81.

⁴⁴ Biart 229, *et seq.*; 2 Bancroft 460, says restriction reaches up to fifty; 28 Enc. Brit. 329, says seventy; as does Clavigero, in Vol. 1, p. 359. Probably sixty is the most reasonable age for the restriction to cease.

⁴⁵ Clavigero 406.

⁴⁶ 2 Bancroft 463.

⁴⁷ 2 Clavigero 406. This is the mean between the laws of Europe which left lying unpunished and those of Japan which frequently condemned liars to death.

ture to make the innocent declare themselves guilty, nor those barbarous proofs by duel, fire, boiling water, and such like that were formerly so frequent in Europe, and which we now read of in history with amazement and abhorrence.”⁴⁸ They made no distinction between a principal and an accessory; both were punishable as principals. It also seems that intoxication was a sufficient plea in defense to a crime. Records of the proceedings of the court were kept by the clerks of the court and were used on appeal.⁴⁹ The pleadings themselves seem to have been oral, and they were not very technical. The testimony was under oath, and the entire procedure was conducted with the utmost dignity and fairness to the rich and poor alike. The penalty of death was inflicted upon judges who pronounced unjust sentences, or a sentence obviously not according to the law; or upon a judge who made an inexact report to the emperor or to the supreme judge or higher court; and upon any judge who accepted a bribe. It was never permissible to delay the final decision of a case for a longer period than eighty days.⁵⁰

CIVIL LAWS.

Slavery existed in a very mild form. Prisoners of war, civilians who voluntarily sold themselves or children sold by their parents, and criminals or debtors were the only classes that could become slaves.⁵¹ A slave could possess property or other slaves, but, like the laws of the Egyptians, a child was never born a slave, whether the issue of slave parents or not. The master had no power of life and death over his slave, nor could he beat him severely unless legally authorized to do so. A sale had to be for legal cause and conducted before at least four witnesses. If sold three times for his own misdeeds, the slave was sacrificed.

Carbajal⁵² discusses at some length the law of torts. It is sufficient for our purposes to merely touch upon that subject. There was a civil action for assault and battery; and generally

⁴⁸ 2 Clavigero 404.

⁴⁹ 2 Bancroft 445.

⁵⁰ Carbajal 79.

⁴⁸ 1 Mayer 105.

⁵¹ 3 Helps 121; Carbajal 7.

in the case of one person causing a loss to another, if done negligently or deliberately, the offender was forced to indemnify the plaintiff; e. g., in the case of a brawl where the participants broke anything, the owner of the chattel could recover its value from the one guilty of the destruction.⁵³ Many of the wrongdoings which by our laws would be treated under the general subject of torts, were treated as crimes by the Aztecs, and gave no right of civil action against the offender. Falsifying boundaries of land, taking possession of the land of another, and a fraudulent double sale of land were all punishable by death.⁵⁴ But the sale of the landlord's realty by his tenant was treated only as conversion, and the tenant's property was confiscated, half going to the purchaser and the remainder to the landlord.⁵⁵ If the finder of a lost child sold it into slavery, the child received half of the property of the defendant and the remaining half was given to the purchaser in recompense for the failure of the consideration and the fraud practiced upon him.

There is not very much in the books relating to the law of contracts, but because of the severe rule against lying it is probable that there was no great need for legislation or judicial decision on this subject. If a man broke a promise to sell, convey, or to do or not to do anything which was legal, by which the failure to do or not to do would work an injury to the other party, the latter had the choice of the civil remedy for indemnity, or of prosecuting the criminal for lying. No consideration was required to sustain a contract, except a promise.⁵⁶

REAL PROPERTY.⁵⁷

The original grants of land were to men who had done great deeds in war.⁵⁸ But any man capable of unusual deeds, whether noble or plebeian, could aspire to a reward of like kind. These grants were in fee tail in so far as they were limited to the eldest son, if competent to manage the estate; if not, then the

⁵³ 2 Bancroft 463, *et seq.*

⁵⁴ 2 Bancroft 462.

⁵⁵ Carbajal 70.

⁵⁶ 2 Bancroft 462; Carbajal 469.

⁵⁷ Carbajal 35.

⁵⁸ Biart, Aztecs, 190.

ancestor had his choice from among the other sons that were competent, on condition that the chosen heir support the rest of the family during the rest of his life. But in case of a failure of heirs, there was an immediate reversion to the state. Beginning with the twelfth century, titles of nobility ran with the land, which, however, were not inalienable except to plebeians.⁵⁹ The official paintings which took the place of our records were so accurate that for many years the Spaniards used them as binding in the settlement of any disputes among the Indians, and they are used to a certain extent today, particularly in the country districts.

There were four classes of tenures:⁶⁰ tenure by the state, by the temple, by the nobility and community tenure. On the records kept in the clerk's offices, the land with title in the state was painted purple;⁶¹ monastic land was not colored, but left plain; while the land of the nobility was painted cochineal red, and community land, yellow.⁶² State realty (in addition to that held directly by the emperor) was divided into lands with the beneficial use in the judges of the Mexican courts, and resorts for people under the care of the state. These lands were inalienable and non-taxable. From the time of Montezuma II, military heroes, great men who had served the state in the capacity of public officers, *savants* who had devoted their lives to science and invention, and perhaps others, were given a whole city (*Colhuacan*) where they were lodged, clothed and cared for, almost luxuriously, by the state.

The lands held by the temples were also inalienable, non-taxable and were used for the support of the church, priests, nuns and other religious retainers. A great part of the lands of Mexico was held by the nobility under a feudal system in some respects parallel to that of the Old World. Certainly the reason for the existence of this system was the same, since the Aztec nobles were required primarily to furnish soldiers for defense or for other military operations of the nation. The number of military retainers that these nobles could put into

⁵⁹ *Id.*

⁶¹ Biart 189.

⁶⁰ Carbajal 35.

⁶² Clavigero 348.

the field has been variously estimated. Prescott says⁶³ that the thirty chief nobles could together put into action three millions at least. The estimate would total from all the nobles at this rate the enormous number of four million men! Probably this is exaggerated, but Prescott certainly was in a position to be accurate.

The tenants owed knight service, free and villein socage, besides the more incidental feudal duties to their landlords, with rights and privileges somewhat similar to the tenants under the English feudal system.⁶⁴

Of the fourth class of tenure, the community, Prescott says:⁶⁵

"The people of the provinces were distributed into *Capuli*, or tribes, who held the lands of the neighborhood in common. Officers of their own appointment parcelled out these lands among the several families of the capuli, and on the extinction or removal of a family, its lands reverted to the common stock, to be again distributed. The individual proprietor had no power to alienate them. The laws regulating these matters were very precise, and had existed ever since the occupation of the country by the Aztecs."

City and other municipal property was divided in practically the same manner. Such land was inalienable, and the urban tenants in common owed free socage to the municipality until marriage, upon which they were liberated.

MARRIAGE.

Marriage was one of the most sacred relations into which the Aztecs entered, and habitually the parent's consent was first obtained. It was customary for men to marry at the age of twenty-two, the girls marrying between seventeen and eighteen. The ceremony seems to have been somewhat more formal than our own, and there was "a perfect community of property" between the parties.⁶⁶ We have seen that incestuous marriages were prohibited,⁶⁷ and that adultery was a capital offense. Clavigero remarks that—"before the law *Julia de Adulteriis* was

⁶³ 1 Prescott 26.

⁶⁴ Biart 189.

⁶⁵ Zurita, Rapport, 51, 62; 1 Prescott 39 (note).

⁶⁶ Carbajal 21.

⁶⁷ 2 Clavigero 406; Carbajal 16.

made by Augustus 'we do not know,' says Vives, 'that a cause of adultery was ever tried in Rome', as much as to say that that celebrated nation failed in justice in a point of this importance for over seven centuries".⁶⁸ In Rome the husband seems to have been permitted to lend his wife to another.⁶⁹ "Among the Mexicans", continues Clavigero, "that infamous commerce with wives was not permitted; nor had they any authority over their lives."⁷⁰

Any complaint against a wife had to be carried before the court of domestic relations, constituted solely for the purpose of considering domestic rights and duties. In these courts even divorces were granted if, in the eyes of the judges, they were merited, but they were not favored, nor could there be any reconciliation between the parties after the divorce, though it was encouraged before the divorce.⁷¹ "Their laws concerning marriage", continues Clavigero,⁷² "were unquestionably more decent and becoming than those of the Romans, the Greeks, the Persians, the Egyptians, and other people of the Old Continent. The Tartars marry their daughters; the Athenians and Egyptians, their sisters." "But," says Herrera, "the Mexicans placed their chief honor in marital affairs."⁷³

We have neglected to deal with the religion of the Aztecs, but the horrors of their revolting sacrifices in the name of their religion were vanishing even before the Spanish thrust their religious institutions upon them. Suppose, however, that the Aztecs had conquered Rome in the early period of the Christian era; "they would have seen men torn to pieces by wild beasts," says Helps, "not for anything so respectable as superstition, but simply to indulge a vile, morbid love of amusement, to gratify the meanest vanity, and to attain the basest popularity."⁷⁴ They would have found women in these places, and perhaps felt the same disgust the Spaniards felt toward the human sacri-

⁶⁸ *Id.*, p. 407.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷² 2 Clavigero 406.

⁷¹ Carbajal 20.

⁷³ 3 Herrera 225. It is true that polygamous marriages were permitted, but polygamy is not such an ancient memory with us that we should judge the evils thereof in the fifteenth century.

⁷⁴ 2 Helps 315.

fices of the Aztecs, and might have tried to convert the Romans with an alternative as vicious as the Spanish Inquisition. "But," continues Helps,⁷⁵ "the old world has always been proud of its Rome and spoken of its Romans as the masters of civilization." Of course "we do not attempt to palliate the failings of that (the Mexican) nation," remarks Clavigero, "but neither can we avoid observing that the most famous people of the old continent have afforded such examples of error and vice in their legislation as make the laws of the Mexicans appear comparatively more mild and conformable to reason."⁷⁶ For centuries the Spanish have been issuing propaganda that Mexicans are barbarous and ignorant; if they are so it is because the Spanish have made them so. Prescott says that—"Zurita is indignant at the epithet (barbarous) bestowed on the Aztecs, an epithet he says 'which could come from no one who had personal knowledge of the capacity of the people or their institutions, and which in some respects is quite as well merited by the European nations.'⁷⁷ This is strong language, yet no one had better means of knowing than this eminent jurist, who for nineteen years held a post in the royal *audiencias* of New Spain."

The laws of a higher civilization are never entirely obliterated by conquest; and in case two civilizations are nearly equal there will be a merger of the better points of the laws of both conquered and conqueror. But where the inhabitants of a subjugated country are in overwhelming majority, the laws that are indigenous to their nation will eventually rise supreme, broadened by the laws of the victors. Spanish laws were ingrafted upon an unwilling soil, and they will, by their very exotic nature, be in a great measure eliminated. The justice of the Aztec laws, built up for centuries by the very people who made them, will dominate; and the customs and present influences of Spain will no longer have the value they once had.

Mexico is the Rome of the New World. There is no country in Europe that has not been greatly influenced by the laws of Rome, and the basis of the legislation and codes of continental

⁷⁵ *Id.*

⁷⁶ 2 Clavigero 405.

⁷⁷ Rapport 200, *et seq.*; 1 Prescott 49 (note).

Europe, even at the present day—centuries after its downfall—is Roman. In no place has its influence been felt so strongly as in Italy, the ancient seat of its great Western Empire. Mexico, for the same reason, will follow the laws of the Aztecs. Comparatively, the Italians bear the same relation to their ancestral jurisprudence as the Mexicans do to theirs—in the former case, merged somewhat with the laws of the invading barbarians, and in the latter merged with and improved by the laws of the Spaniards.

The boiling-pot is seething and when the result is seen it will be found that the Aztecs, because of their superiority as a race, will control Mexico; and the native laws of the Mexicans, because made *by* them and *for* them, will again become a part of them. Nor will the influence of their original jurisprudence stop there, but, like the *Corpus Juris* of Justinian in Europe, the uncoded common law of the Mexicans will direct a great part of the future legislation of Latin America.

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